Petition

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RICHARD E. CAPPS,

Petitioner,

v.

THE STATE OF NEW MEXICO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW MEXICO

PETITION FOR WRIT OF CERTIORARI

JOSEPH (SIB) ABRAHAM, JR.
CHARLES LOUIS ROBERTS
P. O. Box D
El Paso, Texas 79951-0004
(915) 544-7860
Attorneys for Petitioner

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTIONS PRESENTED

I. WHETHER TRIPLY-WRAPPED AND SEALED, OPAQUE CONTAINERS CARRIED IN THE LOCKED TRUNK OF AN AUTOMOBILE EVIDENCE AN EXPECTATION OF PRIVACY SO AS TO REQUIRE A SEARCH WARRANT.

II. WHETHER THE DISTINCTION DRAWN BY THE NEW MEXICO SUPREME COURT BASED ON THE FACT THAT THE CONTAINERS WERE SEARCHED WHILE STILL IN THE TRUNK IS A DISTINCTION WITHOUT LEGAL RELEVANCE OR LOGICAL SUBSTANCE.

III. WHETHER STOP OF A MOVING VEHICLE MAY BE SUPPORTED BY A SINGLE DESCRIPTIVE FACT WHICH IS ONLY A POSSIBILITY WHEN THE REMAINDER OF THE DESCRIPTIVE FACTS ARE INCONSISTENT WITH THE VEHICLE STOPPED.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, RICHARD E. CAPPS, Appellant in the court below, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Mexico entered in the above case on

January 27, 1982. That decision affirmed the conviction and judgment entered by the District Court of Eddy County, New Mexico.

OPINIONS BELOW

The opinion of the Supreme Court of New Mexico in *State v. Capps,* No. 13,486 (N. Mex. Sup. Ct. 1982), from which RICHARD CAPPS now petitions for certiorari is reproduced herein as Appendix "A". Rehearing was sought but was denied in an order in *State v. Capps,* No. 13,486 (N. Mex. Sup. Ct. February 26, 1982), reproduced herein as Appendix "I".

Prior to these holdings, the following are properly part of the appendix in this case. The *Order Denying Reurged Motion to Suppress* in *State v. Capps and Lear,* Nos. CV-79-24 and 25 (Dist. Ct. Eddy Cty., N.M. 1979), was entered on July 11, 1979 and is reproduced herein as Appendix "B". The Memorandum Opinion of the New Mexico Court of Appeals in *State v. Capps and Lear,* No. 4202 (N. Mex. Ct. App. 1980), was entered on March 6, 1980 and is reproduced herein as Appendix "C". The Court of Appeals denied rehearing on March 17, 1980 by endorsing such denial on Petitioner's Motion and such order is reproduced herein as Appendix "D". The New Certiorari in *Capps and Lears v. State,* No. 13,032 (N. Mex. Sup. Ct. 1980), on April 11, 1980 and such order is reproduced herein as Appendix "E".

On remand, the verbal order of the District Court denying Petitioner's reurged motion to suppress after remand is reproduced herein as Appendix "F". The Opinion of the New Mexico Court of Appeals overruling that order in *State v. Capps,* No. 4775 (N. Mex. Ct. App. 1980), is reproduced herein as Appendix "G". The Order of the New Mexico Supreme Court granting certiorari in

State v. Capps, No. 13,486 (N. Mex. Sup. Ct. 1981), is reproduced herein as Appendix "H".

JURISDICTION

The Opinion of the Supreme Court of the State of New Mexico was entered on January 27, 1982. A timely petition for rehearing was denid on February 26, 1982. This petition is timely filed within sixty (60) days of the denial of rehearing as required by Rule 22, *Supreme Court Rules.* This Court's jurisdiction is invoked pursuant to U.S.C. 1257(3).

RELEVANT PORTION OF THE UNITED STATES CONSTITUTION

The United States Constitution, Amendment Four, reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Since there are three transcripts which form the basis of this case, the Petitioner will cite the preliminary hearing transcript as: (Pre. Tr. 1 et seq.); the first suppression transcript as: (Sup. Tr. 1 et seq.); and the combined second suppression hearing/bench trial held on June 10th and 17th, 1980 will be cited as: (Tr. 1 et seq.).

STATEMENT OF THE FACTS

On February 13, 1979, Officer Jerry Privetts, a narcotics officer of the Artesia Police Department, stopped and searched the vehicle occupied by RICHARD E. CAPPS, discovering a large amount of marijuana in the trunk of that vehicle (Pre. Tr. 4-7). Officer Privetts testified that shortly after midnight on the above date he observed a 1976 blue Buick Limited, four-door, bearing a Florida paper dealer's plate, near the 800 Block of N. First Street in Artesia, New Mexico (Pre. Tr. 4; Sup. Tr. 27). At the time, Officer Privetts, a narcotics officer who was not in uniform (Pre. Tr. 5; Sup. Tr. 36, 27), was in an unmarked vehicle (Pre. Tr. 13; Sup. Tr. 26, 37). Responding to the questions of the State as to why his attention was drawn to this particular vehicle, Officer Privetts testified that:

> A. We had received a teletype, I don't recall the exact time; I believe it was about 4:00 o'clock in the afternoon the day before, just a few hours prior, from Texas. It was a BOLO, or be-on-the-lookout item, for a car. I believe it involved a jewelry heist, or something, in Texas. And, this car was *possibly* displaying paper Florida temporary plates.

(Sup. Tr. 27; see also, Pre. Tr. 5) (emphasis added). As to the contents of this teletype, the officer related that:

> Q. Okay, let me ask you, Lieutenant: This teletype, does it not, has not only a name of an individual, his racial grouping, birthdate, age, height, weight, color of hair, color of eyes, color of skin, social security number, and FBI number connected with his case, and a complete description

of a vehicle that he was suspected to have been in, is that not correct?

A. Yes, that's true.

(Sup. Tr. 34). This teletype was introduced into evidence at the Preliminary Hearing as State's Exhibit Four, and again at the Suppression Hearing (Sup. Tr. 35-36), as Defense Exhibit One. Besides describing the individual sought, one "David Thomas Kandaras", the teletype described the vehicle that Mr. Kandaras was last seen driving:

DRIVING
DK GREEN 77 CAD 2D LIC/PP. LIS/FL. LIT/PC.VIN 6D47SQ223544. ALSO MAY HAVE U FLA PAPER DEALER PLATES ON VEHICLE.

(Def. Ex. 1).

Having encountered the dark blue over light blue 1976 Buick four-door bearing a Florida paper plate, the officer then stopped the vehicle (Sup. Tr. 27).

At no time during his testimony at the various hearings did Officer Privetts contend that the Buick violated any traffic laws (Pre. Tr. 4-56; Sup. Tr. 25-29). Officer Privetts specifically testified:

Q. Okay. Was there anything particularly unusual about the driving? Any erratic driving?

A. No.

Q. Speed?

A. No.

(Pre. Tr. 15).

From a safety standpoint, Officer Privetts testified:

Q. The car wasn't over balanced, sunk down in the back, dragging the ground, anything like that, was it?

A. No.

(Pre. Tr. 42).

Thus, it is clear that there was no traffic offense involved in this stop. The District Judge declared this very fact:

> THE COURT: What is the violation that Officer Privetts knows this car has committed? It's not reckless driving or the manner in which the car is being driven. There is nothing about it that is supicious [*sic*] at all; that there is any drugs. The only thing that he can put together, by his testimony, he is being very honest, is that there is a teletype from Texas which said a Florida paper plate; and, I have got a car with a Florida paper plate.

(Sup. Tr. 49).

During the hearings, Officer Privetts admitted several times that, even though he was in radio contact with the police dispatcher (Sup. Tr. 26), he did not request the rest of the data from the teletype (Pre. Tr. 19, 34; Sup. Tr. 35). The District Judge was disturbed about this very oversight, and commented:

> THE COURT: Ah, but all he had to do was pick up his radio and call into the station and say, "Would you mind checking that while I keep this car in sight, and tell me what that car is that we got yesterday on that teletype that was from Texas", and it said—and they would have told him it was a two-door, green Cadillac; and, knowing it was a Buick, he would have turned his car around and gone home, I think.

(Sup. Tr. 46).

After the stop, Officer Privetts found it was occupied by JAMES LEAR and RICHARD CAPPS. After getting out

of his patrol vehicle, he was then handed a driver's license by JAMES LEAR, who was outside the car (Sup. Tr. 28). At that time the officer testified that he could smell marijuana and talcum powder *in the vehicle* (Sup. Tr. 29). According to Officer Privetts, he refused a bribe offer made by JAMES LEAR and told him to open the trunk. At that time, Officer Privetts considered both JAMES LEAR and RICHARD CAPPS as being under arrest (Tr. 20). After the trunk was opened, Officer Privetts saw a number of plastic bags. The officer admitted opening two of the plastic bags located in the truck (Pre. Tr. 35), as well as otheritems of personal luggage found there (Pre. Tr. 28), without securing a warrant (Tr. 29).

These containers were found to contain marijuana (Sup. Tr. 21-33; Pre. Tr. 8-10). In describing the large bag-like containers which held the marijuana, Officer Privetts testified:

> Q. All right. But on two "B" . . . let me go back to the description on it. Inside it don't we have clear, transparent plastic contents, sealed at the top with tape? Then we have an inner lining of a trash bag, and on the outside of all of this the third outer covering is another trash bag, isn't that correct?
>
> A. Right.

(Pre. Tr. 37; see also Pre. Tr. 63).

At the second Motion to Suppress Hearing on June 10, 1980, Officer Privetts testified that the bags were triple-bagged, triple-sealed with duct tape, and one could not tell what was in them by just looking at them (Tr. 23-27). Officer Privetts also testified that such bags were commonly used to carry a lot of innocent personal items, as well as marijuana (Tr. 23), and the trial court agreed that the "innocent uses of a trash bag exceed the guilty uses of a trash bag, given the amount of trash bags

that [are] sold" (Tr. 40). The trial court also agreed from the physical evidence (triple-bagging, tape, etc.), that the person in the car had an expectation of privacy in the bags.

> THE COURT: There is no question about that, in my mind. They wanted what was in that bag to be kept from the general public.

(Tr. 39).

And that the officer must have realized this:

> THE COURT: I don't think there is any question in the officer's mind that what was in the trunk and what was in the bags they wanted to keep private.

(Tr. 40). At the time of opening the trunk, the officer testified that he considered that the individuals (Tr. 20), and the vehicle (Tr. 33), were under his control and custody.

During the course of the bench trial, evidence was introduced by the State which tied the Petitioner to the plastic bags in the trunk. First of all, evidence was introduced that the Petitioner's luggage was found throughout the car; directions were found which led to a cabin in Cloudcroft, New Mexico where the officer seized more plastic bags, with the same markings (Tr. 97); that a black notebook found in Mr. Capps' AWOL bag contained the phone number of the Cloudcroft cabin (Tr. 98); that another slip of paper found in Mr. Capps' wallet also included the phone number of the Cloudcroft cabin (Tr. 102); that aircraft landing lights were found in the Cloudcroft cabin and Mr. Capps' wallet contained a pilot's license (Tr. 106); that Capps had several I.D. under different names in his wallet (Tr. 108); and that in the AWOL bag of Capps, the officer found a pilot's check list together with facts and information peculiar

to marijuana traffic in Colombia (Tr. 113-115, 121). In viewing this and other evidence, the Court held:

> But there is no question in the Court's mind, and beyond any reasonable doubt, not only was [Capps] a passenger in the car, but from the evidence that has been adduced, he knew that it was in the car. He had the telephone number of the house in Ruidoso with the Santa Claus in his wallet. The find at the house in Cloudcroft with the Santa when they finally get there other people who have license—Florida license numbers, using the same address. He has a Florida license with the same address as those people. He has a pilot's license. They find gear in the house that shows that this quantity . . . it was wrapped the similar wrappings in Cloudcroft that was found. Also the Court takes into consideration the fact that when Mr. Capps steps out of the car, he gives to the officer a license in another name and says, "This is me." And, taken together with everything else in this case, shows that he did not want to be identified. And, I am—I just have no problem from the evidence we have and only from the evidence we have in finding, in my own mind, beyond a reasonable doubt that Mr. Capps knew that that was in the back seat. He wasn't somebody who was picked up in Carlsbad just prior to when it happened and went to sleep in the back of the car. And, that was what it said had to prove beyond a reasonable doubt. In the Court's opinion they have done so.

(Tr. 141-142). The Petitioner was convicted and sentenced to:

> be imprisoned in the Penitentiary of New Mexico, for the term of not less than 1 years(s) nor more than 5 years.
>
> Execution of sentence is suspended and Defendant is ordered to be placed on probation for 2 years . . . .

The Appellate history of the case is quite lengthy. The Petitioner filed a *Reurged Motion to Suppress* in the District Court of Eddy County, New Mexico asking for suppression of the evidence seized because of an unlawful stop, *Motion,* at p. 1, and an unlawful search of the containers in the trunk, *Motion,* at pp. 1–2. The motion was denied, see *Order,* Appendix "B", and this denial formed the basis of an interlocutory appeal to the New Mexico Court of Appeals. Before that Court, the Petitioner again challenged the stop, *App. Joint Brief in Chief,* at pp. 7–16, and the container searches, *ibid.*, at pp. 21–23. The Court of Appeals upheld the stop but declined to decide the container issue, see Memorandum Opinion, Appendix "C", and also denied rehearing, see endorsed order, Appendix "D". The *Appellant's Motion for Rehearing* had also challenged both the stop, *ibid.*, at p. 1; and the container searches, *ibid.*, at p. 3. A subsequent *Petition for Certiorari* to the New Mexico Supreme Court also complained of the stop, at pp. 13–14; and the container searches, at pp. 15–17, but was denied by order of the Court, see Appendix "E".

Following remand, the Petitioner filed a *Defendant's Joint Motion to Suppress Upon Remand* which similarly complained of the stop, at p. 1, and the container search, at p. 1. The District Court denied this motion orally (see Appendix "F"). In a subsequent appeal in the New Mexico Court of Appeals, the Petitioner raised both the stop and the search in his *Appellant's Brief* at pp. 8–11, 11–17. The Court of Appeals reversed the District Court on the container search issues but continued to follow its earlier decision regarding the stop, see Appendix "G". Subsequently, the Supreme Court of New Mexico granted Certiorari at the State's urging (see Appendix "H"), and later reversed the Court of Appeals (see

Appendix "A"). Judge Sosa wrote in his dissent to that opinion that the New Mexico Supreme Court had reversed the United States Supreme Court, "*sub silencio*" (see Appendix "A"). In his response in that Certiorari action, the Petitioner had again argued that the stop was invalid as was the container searches, *Respondent's Brief,* at pp. 9-13, 14-25. Rehearing was sought as to these two issues, *Motion for Rehearing,* at pp. 10-12, 3-10, but such rehearing was denied (see Appendix "I").

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

TRIPLY-WRAPPED AND SEALED, OPAQUE CONTAINERS CARRIED IN THE LOCKED TRUNK OF AN AUTOMOBILE EVIDENCE AN EXPECTATION OF PRIVACY SO AS TO REQUIRE A SEARCH WARRANT.

The holding of the New Mexico Supreme Court in *Capps, supra*[1] held that the search of triply-wrapped and sealed opaque plastic bags in the locked trunk of an automobile did not require a warrant. The holding was based on the fact that because the officer opened the bags while they were still in the trunk that the automobile exception applied, *Capps,* at pp. 3-10. The New Mexico Supreme Court declined to follow the decision of this Court in *Robbins v. California,* ___ U.S. ___, 101 S. Ct. ___, 69 L. Ed. 2d 744 (July 1, 1981), which held that "two packages wrapped in green, opaque plastic" located in the "recessed luggage compartment" of an automobile "may not be opened without a warrant,

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[1] *State v. Capps,* No. 486 (N. Mex. Sup. Ct. 1982).

even if found during the lawful search of an automobile, *Robbins,* 69 L. Ed. 2d 744, at 748, 752.

In reaching its decision in *Robbins,* the United States Supreme Court specifically discounted the premise that the automobile exception would apply to such facts:

> In *United States v. Chadwick,* 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), the Government argued in part that luggage is analogous to motor vehicles for Fourth Amendment purposes and that the "automobile exception" should thus be extended to encompass closed pieces of luggage. The Court rejected the analogy and insisted that the exception is confined to the special and possibly unique circumstances which were the occasion of this genesis. First, the Court said that "[o]ur treatment of automobiles has been based in part on their inherent mobility which often makes obtaining a judicial warrant impracticable." *Id.* at 12. While both cars and luggage may be "mobile", *luggage itself may be brought and kept under the control of the police.*
>
> Second, the Court acknowledged that "inherent mobility" cannot alone justify the automobile exception, since the Court has sometimes approved warrantless searches in which the automobile's mobility was irrelevant. See *Cady v. Dombrowski,* 412 U.S. 433, 441-442; 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), *South Dakota v. Opperman,* 428 U.S. 364, 367, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976). The automobile exception, the Court said, is thus also supported by "the diminished expectation of privacy which surrounds the automobile" and which arises from the facts that a car is used for transportation and not as a residence or a repository of personal effects that a car's occupants and contents travel in plain view, and that automobiles

> are necessarily highly regulated by government. *United States v. Chadwick, supra,* at 12-13. No such diminished expectation of privacy characterizes luggage; on the contrary, luggage typically is a repository of personal effects, the contents of closed pieces of luggage are hidden from view, and luggage is not generally subject to state regulation.
>
> In *Arkansas v. Sanders,* 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979), the State of Arkansas argued that the "automobile exception" should be extended to allow the warrantless search of everything found in an automobile during a lawful warrantless search of the vehicle itself. The Court rejected this argument for much the same reason it had rejected the Government's argument in *Chadwick.* * * *

Robbins, 29 Cr. L. 3116 (emphasis supplied).

The Supreme Court instead based its opinion on the "expectation of privacy"; *Katz v. United States,* 389 U.S. 347 (1967):

> In the present case, the Court once again encounters the argument—made in the Government's brief *amicus curiae*—that the contents of a closed container carried in a vehicle are somehow not fully protected by the Fourth Amendment. But this argument is inconsistent with the Court's decisions in *Chadwick* and *Sanders.* Those cases made clear, if it was not clear before, that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else. * * *
>
> The respondent's argument cannot prevail for at least two reasons. First, it has no basis in the language or meaning of the Fourth Amendment. That Amendment protects people and their effects and it protects those effects whether they are

> "personal" or "impersonal". The contents of Chadwick's footlocker and Sanders' suitcase were immune from a warrantless search because they had been placed within a closed, opaque container and because Chadwick and Sanders had thereby reasonably "manifested an expectation that the contents would remain free from public examination". *United States v. Chadwick, supra* at 11. Once placed within such a container, a diary and a dishpan are equally protected by the Fourth Amendment.
>
> Second, even if one wished to import such a distinction into the Fourth Amendment, it is difficult if not impossible to perceive any objective criteria by which that task might be accomplished. What one person may put into a suitcase another may put into a paper bag. * * *

Robbins, 29 Cr. L. 3117 (emphasis supplied).

In contrast, the New Mexico Supreme Court held on the identical facts that:

> We find that the opening of the plastic bags during the car search was within the extents of the automobile exception. The officer did not violate Capps' Fourth Amendment rights.

The New Mexico Supreme Court did not consider the issue of "expectation of privacy", *Katz, supra* which forms the cornerstone of recent Fourth Amendment law, including *Chadwick* and *Sanders*, and indeed did not mention that principle a single time in its majority opinion, *Capps, supra.* Thus, that Court's recent opinion in *Capps* directly contradicts the holding of the United

States Supreme Court both in the actual decision reached and in the principles applied.[2]

In ignoring *Robbins,* the New Mexico Supreme Court seems to place reliance on the fact that at least four members of the Court asked the parties to brief the issue of whether *Robbins* should be reconsidered, *United States v. Ross,* No. 80-2209, 30 Cr. L. 4029 (U.S. Sup. Ct. Oct. 1981). In this regard, Petitioner would point out two considerations worthy of note. First, *Ross* deals only with a "paper bag" (30 Cr. L. 4029, 29 Cr. L. 2110) which could bring the forthcoming opinion in *Ross* in line with Justice Powell's concurring opinion in which he criticized the plurality opinion of the Court as establishing a new "bright line rule . . . which would require officers to obtain warrants in order to examine the contents of insubstantial containers in which no one has a reasonable expectation of privacy", *Robbins,* 29 Cr. L. 3118. Justice Powell was careful to point out, however, that:

> I nevertheless concur in the judgment because the manner in which the package at issue was carefully wrapped and sealed evidenced petitioner's expectation of privacy in its contents. As we have stressed in prior decisions, a central purpose of the Fourth Amendment is to safeguard reasonable expectation of privacy. * * *

Robbins, 29 Cr. L. 3118. Thus, a reconsideration of the general holding in *Robbins,* if a reconsideration is made at all, could be limited to restricting *Robbins* to its facts and establishing a case by case basis instead of the

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[2] This decision also directly conflicts with the decision of the Supreme Court of Maine in *State v. Blais,* 416 A.2d 1253 (Me. 1980).

"bright line" rule of the plurality. Such a result would still compel a decision in favor of the Petitioner in this case, see concurring opinion, Brennan J. 69 L. Ed. 2d 744 at 752-756. Thus, if the United States Supreme Court fails to reconsider *Robbins* or if this Court limits *Robbins* to its facts, see concurring opinion of Brennan, J. 60 L. Ed. 2d 744 at 752-756, the decision of the New Mexico Supreme Court would still be in direct conflict with that holding. Only if this Court specifically overrules its own decision delivered in July of 1981 would the New Mexico Supreme Court's recent holding in *Capps* be vindicated.

Secondly, and even more important, the law in *Robbins* is the law of New Mexico and its sister states until (and if) it is overruled by this Court, Justice Brennan, *State Court Decisions and the Supreme Court,* 31 Penn. Bar Assn. Q. 393 (1960), and as such is entitled to full respect from the New Mexico Supreme Court up to that pont (if that point ever arrives). The State of New Mexico has engaged in forecasting the future and has convinced New Mexico Supreme Court to act on the basis of its forecast. In law, this is slim basis indeed for overruling a clear and specific decision of the United States Supreme Court.[3] Petitioner would ask this Court to rehear this case and follow *Stare Decisis* and *Robbins* because that course is consistent with the principles of

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[3] One might wonder if this Court would look favorably upon the Court of Appeals overruling a prior holding of this Court on the basis that Certiorari had been granted in a case where that holding could be overruled and on the basis of one party's prediction that the holding would indeed be overruled. *Stare Decisis* is difficult enough to apply without the intervention of delphic oracles forecasting what this Court or what the United States Supreme Court will do in the future.

our system of law which have been in existence for hundreds of years.

II.

THE DISTINCTION DRAWN BY THE NEW MEXICO SUPREME COURT BASED ON THE FACT THAT THE CONTAINERS WERE SEARCHED WHILE STILL IN THE TRUNK IS A DISTINCTION WITHOUT LEGAL RELEVANCE OR LOGICAL SUBSTANCE.

The lower Court in its opinion apparently relied on the fact that:

> The officer in *Robbins* must have been considered to have seized the bricks of marijuana. The officer here never seized the plastic bags. While the bags were in the car, he tore a hole in them. The *Sanders-Chadwick* analysis is not applicable to the present case.

And the authority relied upon by the Court below in holding that this was a distinction from *Robbins* was *United States v. Milhollan,* 599 F.2d 518 (3d Cir. 1979), *cert. denied,* 444 U.S. 909 (1979). In regard to this "principle" offered as a distinction and the authority presented by the New Mexico Supreme Court, the Petitioner would offer three arguments to consider.

First, the fact that the officer "tore a hole" in the plastic bags before removing them from the trunk is not a distinction recognized by any Court including *Milhollan, supra.* Not only is the distinction without legal support, it is without logical support as well. The Petitioner contends that the opening or penetrating of a container is as much a seizure conducted inside a trunk as conducted outside a trunk. The United States Supreme Court in *Robbins* held that the automobile exception did not apply to sealed containers because "while both cars and luggage may be mobile, luggage may

be brought and kept under the control of the police",[4] *Robbins,* 69 L. Ed. 2d 744, at 749.

To draw a distinction regarding luggage searched while it is still in the trunk would mean that the United States Supreme Court would have upheld the search of the *Sanders* suitcase, *if it were searched while still in the trunk.* Such a rule would mean that officers would always be leaning into trunks trying to open luggage without "seizing" them. Thus, this principle appears to be more a receipt for back strain among law enforcement officers than a valid constitutional distinction. Secondly, and in addition, the fact that the package is opened inside the trunk as against outside the trunk is irrelevant to the central consideration which is "expectation of privacy", *Katz, supra.* Is it reasonable to say that an individual has an expectation of privacy against the opening of any package removed from his car, but would not have the same expectation toward the same package if it were opened before removal?

Aside from the fact that *Milhollan* does not make such a distinction, the Petitioner would point out that the *Milhollan* case is not an appropriate precedent in construing, applying, or limiting *Robbins.* First of all. the *Milhollan* case predates *Sanders* and *Robbins,* a fact which explains its reliance on the automobile exception which was later rejected in both these cases. Furthermore, the fact that Certiorari was denied in *Milhollan*

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[4] Indeed, this is exactly what happened after the officer's penetration of the bags, they were removed and transported to the police station (TR 13, 32-33). Before the opening of the bag, the officer testified that: (1) the individuals were under at least technical arrest (TR 20, 29); and (2) the vehicle itself had been seized (TR 33).

is no precedential authority whatsoever. The United States Supreme Court has frequently reiterated that: "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times", *United States v. Carver,* 260 U.S. 482, 490; see also, *Hughes Tool Co. v. Trans World Airlines,* 499 U.S. 363, 366 at n.1. Thus, in summary, neither the distinction nor the authority utilized by New Mexico Supreme Court appear to be strong enough to avoid the clear and specific holding of *Robbins.*

III.

A STOP OF A MOVING VEHICLE CANNOT BE SUPPORTED BY A SINGLE DESCRIPTIVE FACT WHICH IS ONLY A POSSIBILITY WHEN THE REMAINDER OF THE DESCRIPTIVE FACTS ARE INCONSISTENT WITH THE VEHICLE STOPPED.

The Petitioner would ask this Court to consider the portions of the opinions of the New Mexico Court of Appeals in *State v. Capps,* No. 4202 (N. Mex. Ct. App. 1980), and in *State v. Capps,* No. 4775 (N. Mex. Ct. App. 1980), in which the stop was upheld. In a brief review of the facts of the stop, the suspect vehicle was stopped by a New Mexico narcotics officer solely upon the fact that an out-of-state teletyped bulletin revealed that a burglary suspect vehicle in Texas "may have Florida dealers plates" (Def. Ex. 1). The other descriptive facts in the bulletin as to make of the car, year of the car, and color of the car were inconsistent with the subject vehicle (Def. Ex. 1; Sup. Tr. 27; Pre. Tr. 4). Indeed, it was not the vehicle described in the bulletin. The officer was candid in admitting that the vehicle did not violate any traffic laws (Pre. Tr. 15); and that it did not appear heavily loaded (Pre. Tr. 42).

The Petitioner would respectfully contend that the two decisions of the Court of Appeals are in apparent conflict with the holding of the United States Supreme Court. In *Brignoni-Ponce,* 422 U.S. 873 (1975), the United States Supreme Court noted that "Mexican ancestry" coupled with "proximity to the border" could indicate illegal aliens, however, the Court noted that these two factors, even taken together, were too general to supply reasonable suspicion, which the Court denied in the following terms:

> [O]fficers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion . . . .

Brignoni-Ponce, 422 U.S. 880.

> Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.

Brignoni-Ponce, 422 U.S. at 883 (footnotes omitted).

Of all the vehicles bearing Florida dealer plates in Texas, Florida, New Mexico and the other forty-five (45) contiguous states, the odds were small that any vehicle stopped for that reason alone would be the subject vehicle sought, *Brignoni-Ponce,* 422 U.S. 883. Indeed, the instant vehicle was not the vehicle sought. The Florida paper plate may have been a relevant factor, *Brignoni-Ponce,* 422 U.S. at 883, but it was not specific enough in itself to justify a stop upon reasonable suspicion without the remainder of the bulletin.

Looked at from another perspective, the bulletin is only a "be-out-on-the-lookout-for" teletype (Sup. Tr. 27), and does not reflect an arrest warrant or, at most, would constitute reasonable suspicion. See *Whitely v. Warden,* 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971). Even aside from the fact that the credibility of this bulletin has never been established by the State, the question remains as to what level of suspicion is left when the definite details of the bulletin are ignored in favor of a "possible" detail, "also *may* have Fla. Dealers Plates" (Def. Ex. 1; App. B).

The Petitioner would also refer this Court to the probable results of allowing such stops: (1) that in the instant case, all cars bearing Florida dealer's plates could have been validly stopped in New Mexico, Texas, Florida and in other states until the proper car was found; (2) that in future cases, a single identifying factor, which could be only a possibility, would be enough to stop all vehicles or persons who may not fit the total description, but who have one characteristic in common with the description; (3) that because of the "hundreds" (Sup. Tr. 27) of such bulletins received by this officer daily, "pretext stops" by enterprising narcotics officers, such as the narcotics officer in this case, could always be justified by reliance on any single identifying factor in one of the hundreds of bulletins received. Therefore, in light of the law and of the future ramifications of such a policy the Petitioner asks this Court to hear this matter.

CONCLUSION AND PRAYER

WHEREFORE, the above premises considered, the Petitioner prays that this Court grant a writ for certiorari to the New Mexico Supreme Court and thereafter reverse their holding on either of the two grounds presented herein.

Respectfully submitted,

LAW OFFICES OF:
JOSEPH (SIB) ABRAHAM, JR.
P. O. Box D
El Paso, Texas 79951-0004
(915) 544-7860
Attorneys for Petitioner

By: _____
CHARLES LOUIS ROBERTS

Appendix

APPENDIX A

IN THE
SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 13,486

[Filed: Jan. 27, 1982]

STATE OF NEW MEXICO,
Petitioner,

v.

RICHARD E. CAPPS,
Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

For Petitioner:

Jeff Bingaman, Attorney General
Charles F. Noble, Assistant Attorney General
Santa Fe, New Mexico

For Respondent:

Albert Engel
Las Cruces, New Mexico

Charles Louis Roberts
Joseph Abraham, Jr.
El Paso, Texas

OPINION

RIORDAN, Justice.

Defendant Richard E. Capps (Capps) was convicted of possession of marijuana with the intent to distribute. § 30-31-22(A)(1), N.M.S.A. 1978 (Repl. Pamp. 1980). The Court of Appeals reversed the defendant's conviction holding that a police officer had conducted an unlawful car search by tearing open one of nine plastic bags that contained marijuana, located in the car's trunk. We granted certiorari, and we reverse the Court of Appeals.

The issue presented on appeal is whether the police officer pursuant to the "automobile exception" could search the trunk of a car and open the plastic bags located in the trunk.

A police officer, who was a narcotics investigator with 16 years of law enforcement experience, validly[1] stopped a car driven by James Lear (Lear) and occupied by Capps. When he approached the car, the officer smelled marijuana and talcum powder coming from the car. The officer knew from experience that talcum powder was frequently used to mask the odor of marijuana. The officer asked if Lear minded if he looked inside the trunk. Lear answered, "No, I guess not." However, before unlocking the trunk, Lear attempted to bribe the officer saying, "Look, Officer, can't we make a deal? If you'll just forget this whole thing, I'll make it worth your while." The officer refused the bribe and ordered Lear and Capps to keep their hands where he could see them. Lear then volunteered the statement, "We got

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[1] Prior to trial, the Court of Appeals granted the defendant an interlocutory appeal to determine whether the stop was valid. The Court of Appeals in a memorandum opinion, found the stop valid.

no guns. We got dope, but we don't got no guns." When Lear opened the trunk of the car, the smell of marijuana and talcum powder became stronger. The officer observed nine dark green trash bags with silver tape sealing them and a brown paper bag. The officer then tore a hole in one of the trash bags and also looked inside the brown paper bag. They contained marijuana.[2]

The trial court ruled that the officer had probable cause to search the trunk and bags and that no warrant was needed.

Two well recognized exceptions to obtaining a search warrant are: search incident to arrest and the automobile exception, sometimes referred to as the Carroll Doctrine. The common element running through these two exceptions is exigency.

Incident to Arrest

In *Agnello v. United States,* 269 U.S. 20 (1925), the Court held that a lawful arrest gives rise to a contemporaneous search of the place where the arrest is made in order to find and seize items connected with the crime. *Agnello* did not, however, define the extent of such a search. In *Marron v. United States,* 275 U.S. 192 (1927), a search of a closet was upheld as incident to an arrest. However, in *United States v. Lefkowitz,* 285 U.S. 452 (1932), the Court held unlawful a search of desk drawers and a cabinet despite the fact that the search had accompanied a lawful arrest. But in *Harris v. United States,* 331 U.S. 145 (1947), *overruled on this issue,* 395 U.S. 752 (1969), a search of an entire apartment was upheld as incident to an arrest. Thus, we find

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[2] The nine plastic bags contained approximately 88 pounds of marijuana.

that the Supreme Court has broadened and narrowed the perimeters, of the search incident to arrest exception, over the years.

In *Chimel v. California,* 395 U.S. 752 (1969), the permissable extent of a search incident to a lawful arrest was redefined. In *Chimel,* the defendant was arrested inside his home. The officers making the arrest searched the defendant's entire house looking for evidence of the crime. The Court held that incident to an arrest, a search is confined to the area within the *immediate control* of the defendant in order to seize weapons and/or to prevent the destruction of evidence. Therefore, the seizure in *Chimel* was unlawful.

In the recent United States Supreme Court case *New York v. Belton,* ___ U.S. ___, 101 S. Ct. 2860 (1981), it now appears, that in reference to car searches, the limits of a search incident to an arrest has been expanded or redefined. The officer in *Belton* stopped a car for speeding. When he approached the car, he smelled marijuana. The officer arrested the four occupants and then searched the passenger compartment. On the back seat, he found a black leather jacket belonging to Belton. He unzipped one of the pockets and discovered cocaine. The Supreme Court upheld the search. The Court stated that "when a policeman had made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporarneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 2864. The Court further held that "the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within the reach of the arrestee, so also will containers in it be within his reach." *Id.*

Automobile Exception

The "automobile exception", also referred to as the Carroll Doctrine, has also been a difficult area in understanding the permissible limits of a warrantless search. The exception began with *Carroll v. United States*, 267 U.S. 132 (1925). A car was stopped and searched without a warrant. The search turned up 68 bottles labeled "scotch whiskey" and "Gordon's gin". Carroll was convicted of violating the National Prohibition Act. The Supreme Court held that a search is proper when it is not practicable to secure a warrant because of the mobility of an automobile. However, before a search can be conducted two requirements must be met:

1) There must be probable cause[3] that the automobile contains evidence of a crime, and

2) there must be an exigency to search the automobile at that moment, because of the automobile's mobility and fear that evidence could be destroyed.

Between 1925 and 1970, the Carroll Doctrine was seldom relied on and was not really developed by the Supreme Court decisions, probably because most cases were decided under the "search incident" exception that was broadly interpreted prior to *Chimel*.[4] There were

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[3] The United States Supreme Court in *Carroll, supra* at 161, defines probable cause as: "'[i]f the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.'" (Citation omitted.)

[4] For an excellent discussion of the history of the automobile exception, see Moylan, *The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label*, 27 Mer. L. Rev. 987 (1976).

opinions during this time citing *Carroll, e.g., United States v. Lee,* 274 U.S. 559 (1927); *Gambino v. United States,* 275 U.S. 310 (1927); *Brinegar v. United States,* 338 U.S. 160 (1949), but not until *Chambers v. Maroney,* 399 U.S. 42 (1970) (the year after *Chimel*), did the Supreme Court breath new life into the Carroll Doctrine. *Chambers* dealt with a gas station robbery. The two men involved were arrested and their car was taken to the police station and searched without a warrant. During the search, evidence of the robbery was found. The search was upheld under the Carroll Doctrine. The Court held that the officers had probable cause to believe that the robbers' car contained guns and fruits of the crime. The right to search and the validity of the seizure was not dependent on the right to arrest. They were based on the probable cause that the seizing officer had, that the contents of the automobile included evidence or fruits of the crime.

In the present case, the officer's right to search was not dependent on the arrest, but rather upon the officer's belief that the automobile contained evidence of a crime. *Carroll* and *Chambers* justified the search of the entire car and the officer's opening and seizing the plastic bags.

The officer in this case had validly stopped Lear's car. He then smelled marijuana and talcum powder as well as having the voluntary admission that the car contained "dope". The smell of marijuana *alone* can satisfy the probable cause requirement for a warrantless search. *United States v. Rumpf,* 576 F.2d 818 (10th Cir.), *cert. denied,* 439 U.S. 893 (1978); *United States v. Bowman,* 487 F.2d 1229 (10th Cir. 1973). Thus, the aroma gave the officer probable cause to search the car, including the trunk. *State v. Sandoval,* 92 N.M. 476, 590 P.2d 175 (Ct. App. 1979). The officer did not need to obtain

a search warrant. The officer had probable cause to search the car immediately. "[A]utomobiles . . . may be searched without a warrant . . . *provided that there is probable cause to believe* that the car contains articles that the officers are entitled to seize." (Emphasis added.) *Chambers v. Maroney, supra* at 48.

Although there is probable cause, the second factor, exigent circumstances, must also be present. *United States v. Milhollan,* 599 F.2d 518 (3rd Cir.), *cert. denied,* 444 U.S. 909 (1979), restates the second factor as "the justification for the search must arise suddenly and unexpectedly." *Id.* at 526. The officer stopped Lear's car because of an earlier teletype that stated to be on the lookout for a car that fitted the description of Lear's car. When Lear was getting his car registration, the officer then smelled marijuana and talcum powder. Prior to this, the officer had *no* knowledge that the car may contain marijuana. Therefore, probable cause was satisfied by the aroma and the admission of the driver; and exigent circumstance was satisfied by this unexpected discovery and by the fact that the automobile was mobile. The officer satisfied the two requirements to the automobile exception. He could then search the *entire car* knowing that marijuana may be located somewhere in the automobile. *Chambers v. Maroney, supra*; *United States v. Milhollan, supra.*

Capps claims that even if the officer was authorized to search the automobile *including the trunk,* he was not allowed to open the bundles or the paper sack in the trunk. This is not true; the officer could search the entire car including containers inside the car to locate marijuana. In *United States v. Milhollan, supra,*[5]

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[5] The United States Supreme Court denied certiorari to *United States v. Milhollan, supra,* October 9, 1979. *Arkansas v. Sanders, infra,* was decided June 20, 1979.

Milhollan was trying to cash suspicious money orders. The teller at the bank notified an officer who approached Milhollan; Milhollan ran and was apprehended a few blocks away. A search of Milhollan produced car keys to a gold Capri. The officer found the car in a public parking lot. The officer drove the car to the police station and then searched it. A closed but unlocked satchel was found in the back seat. The officer opened the satchel and found cash and stolen money orders. Milhollan contended that the search of the car and the satchel were illegal. The Court, however, found a valid search of *both* under the Carroll Doctrine. The police had probable cause to search Milhollan's automobile because of their belief that there may be evidence of an attempt to pass stolen or forged money orders. The probable cause was also found to arise suddenly and unexpectedly because events surrounding the arrest triggered the officer's suspicion that the automobile contained evidence. Therefore, the search of the automobile was valid. Relying on *State v. Chadwick,* 433 U.S. 1 (1977), Milhollan contended that the search of the satchel was invalid. The Court held that *Chadwick* was not applicable. In *Chadwick,* the trunk was the target of the investigation or search rather than the automobile that was carrying it.

> Here, the police had probable cause to believe that Milhollan's car, not a particular container in brief contact with Milhollan's car, contained evidence of a crime. Their suspicions were not localized; their search of the automobile was not a pretext for a search of the satchel. They only knew that somewhere in Milhollan's automobile there probably was evidence shedding light on his true identity. These facts bring this case within *Chambers* and distinguish it from *Chadwick.*

United States v. Milhollan, supra at 527.

In the present case, the plastic bags in the trunk were not the target of the officer's search. The officer was searching for marijuana; he did not know where it would be located. Thus, the officer is allowed to search items or containers located in the car to find the contraband as long as a specific container is not a particular target. *Arkansas v. Sanders,* 442 U.S. 753 (1979), and *United States v. Chadwick,* 433 U.S. 1 (1977), are not applicable to this case. *Sanders* and *Chadwick* are "container" cases and this present case *is not* a container case.

In *Chadwick,* a suspicious footlocker thought to contain marijuana was loaded from a train to the trunk of a car. While the trunk was still open, arrests were made and the footlocker was seized. The locker was taken to a Federal Building and opened an hour and one-half after the arrests. The Supreme Court held that the warrantless search of the trunk was invalid because it was already in custody; therefore, there were no exigent circumstances.

In *Sanders,* an officer had received information that the defendant would be coming in on a flight with a green suitcase containing marijuana. At the airline baggage pick-up, the defendant picked up a green suitcase matching the description received by the officer. The green suitcase was put in a taxi's trunk, and the taxi drove away. The officer stopped the taxi a few blocks away. Upon the request of the officer, the taxi driver opened the trunk of his vehicle. The officer found the green unlocked suitcase and without asking permission, the police opened the suitcase finding marijuana. The state of Arkansas argued that *Carroll* applied; however, the Court stated:

> Here, as in *Chadwick,* the officers had seized the luggage and had it exclusively within their control at the time of the search.
>
> . . . .
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> . . . Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken. Accordingly, as a genenral rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places.

Sanders, supra at 762-64.

Sanders, in a footnote, explained that the seizure of a "target container" and the seizure of an automobile is quite different.

> We view, however, the seizure of a suitcase as quite different from the seizure of an automobile. In *Chambers,* if the Court had required seizure and holding of the vehicle, it would have imposed a constitutional requirement upon police departments of all sizes around the country to have available the people and equipment necessary to transport impounded automobiles to some central location until warrants could be secured. Moreover, once seized automobiles were taken from the highway the police would be responsible for providing some appropriate location where they could be kept, with due regard to the safety of the vehicles and their contents, until a magistrate ruled on the application for a warrant. Such a constitutional requirement therefore would have imposed severe, even impossible, burdens on many police departments. (Citations omitted.)

Id. at 765, no.14. In the present case, if the officer was not allowed to search the entire automobile, he would have had to seize the automobile because he did not know where the marijuana was particularly located.

When an officer executes a search warrant, he may search thoroughly every part of the described premises *where there is any likelihood that the property sought may be found.* 1 WHARTON'S CRIMINAL PROCEDURE § 172 (12th ed. 1974). The same principle applies when a lawful search, without a warrant, is conducted pursuant to a warrant exception. If there is probable cause to search for a particular item, the officer can search every container and location within the permitted area where that item could be located.

Between the time certiorari was granted in this case and the decision, the United States Supreme Court decided *Robbins v. California,* ___ U.S. ___, 101 S. Ct. 2841 (1981).[6] In deciding this case, we have fully examined *Robbins* and feel that it is not controlling.

In *Robbins,* the defendant, driving erratically, was validly stopped by a police officer. When the defendant opened the car door to show his registration, the officer smelled marijuana. The Court found that the officer had probable cause to search Robbins' car, including the trunk. In the luggage compartment of the trunk were a totebag and two packages wrapped in green opaque plastic. The police unwrapped the packages; the packages contained marijuana.

The Supreme Court analyzed *Robbins* as a *Sanders-Chadwick* container case. The Court reiterates the same language cited on page 8 of this opinion. That once the police have seized the suitcase, the extent of its mobility is no longer affected. The officer in *Robbins* must have

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[6] The United States Supreme Court has granted review of *United States v. Ross,* 50 LW 1056 (1981), and has directed the parties to address the question whether the Court should reconsider *Robbins v. California, supra.*

been considered to have seized the bricks of marijuana. The officer here never seized the plastic bags. While the bags were in the car, he tore a hole in them. The *Sanders-Chadwick* analysis is not applicable to the present case.

We find that the opening of the plastic bags during the car search was within the extents of the sutomobile exception. The officer did not violate Capps' Fourth Amendment rights.

The decision of the Court of Appeals is reversed.

IT IS SO ORDERED.

/s/ William Riordan, Justice

WE CONCUR:

/s/ H. Payne, Justice

/s/ William R. Federici, Justice

Mack Easley, Chief Justice (Concurring in the Result)

Dan Sosa, Jr., Senior Justice (Dissenting).

DISSENTING OPINION

I respectfully dissent.

I cannot join in the majority opinion for the following reasons:

1. The United States Supreme Court has consistently held that the "automobile exception" to the warrant requirement *does not* justify the warrantless search of a closed container found inside the luggage compartment of an automobile. Yet, the majority purposely ignores the clear mandate of the United States Supreme Court in *Robbins v. California*, ___ U.S. ___, 101 S. Ct. 2841 (1981); *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977). *Robbins*, in particular, is indistinguishable from the case at bar and unquestionably supports a holding that the evidence herein should be suppressed. We are required to follow the United States Supreme Court decisions interpreting federal constitutional questions. *Bourquet v. Atchison, Topeka & Santa Fe Railway Co.*, 65 N.M. 207, 334 P.2d 1112 (1959); *Silva v. Crombie & Co.*, 39 N.M. 240, 44 P.2d 719 (1935). The majority opinion is a blatant violation of our own mandate and overrules the above cases *sub silentio*. In fact, the United States Supreme Court rejects the argument that state courts can interpret the Fourth Amendment of the federal constitution in a more restrictive fashion than what they have. *Oregon v. Hass*, 420 U.S. 714 (1975).

2. The majority opinion has, in effect, done away with the warrant requirement of our federal and state constitutions, stating, "If there is probable cause to search for a particular item, the officer can search every container and location within the permitted area where that item could be located."

3. The surrounding circumstances in the case at bar amounted to probable cause to search the bags. However, probable cause alone has never been sufficient to justify a warrantless search absent exigent circumstances. The State did not claim that exigent circumstances existed to search the bags. As such, the officer should have and could have obtained a search warrant.

4. The majority is negating the constitutional protections afforded all individuals simply on the basis of this particular defendant's guilt.

5. The historical dissertation regarding the "search incident to an arrest" and "automobile" exceptions to the warrant requirement is nothing more than dicta; the only issue before us on certiorari is whether the officer's warrantless search of the tri-wrapped and taped bags was unconstitutional.

I shall now elaborate on the theses of my dissent.

A more thorough discussion of the facts follows: On February 13, 1979, Officer Privetts of the Artesia Police Department stopped a car in which the defendant was a passenger.[1] The officer inquired of the driver as to the ownership of the vehicle. While the driver opened the door to reach in the glove compartment and obtain ownership papers, the officer smelled an aroma of raw marijuana. The officer then asked the driver what he had in the car. After the driver answered "nothing," the officer asked if he could look in the trunk. After hesitating for some time, the driver accompanied the officer to the rear of the vehicle. The defendant remained in the back seat of the vehicle. After placing the key in

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[1] On April 11, 1980, this Court denied appellee's writ of certiorari which challenged the Court of Appeals' memorandum opinion upholding the validity of this stop. (No. 13,032).

the trunk, the driver attempted to bribe the officer. The officer then ordered the driver and the defendant to keep their hands where he could see them. The officer testified that, at this point, he considered the driver and the defendant to be under arrest. After being told to keep their hands where the officer could see them, the driver told the officer: "We got no guns. We got dope, but we don't got no guns." The trunk was then opened and the aroma of raw marijuana and talcum powder became stronger. The officer observed nine dark green trash bags sealed with silver tape and a brown paper bag.[2] The officer then tore a hole in one of the trash bags so that he "could see inside of it," although he "knew what was in them." The bags were then removed from the car and put in police department evidence lockers and the car was impounded.

The trial court denied motions to suppress, and later found the defendant guilty of possession of marijuana with the intent to distribute. The Court of Appeals (Andrews, J., dissenting) reversed the trial court, holding that the warrantless search of the containers was unconstitutional. The majority now reverses the Court of Appeals.

The major flaw of the majority opinion is the majority's refusal to follow the clear mandate of the United States Supreme Court in *Arkansas, supra,* and *Robbins, supra.*

In *Arkansas,* the United States Supreme Court was presented with the issue of whether the warrantless search of the defendant's suitcase fell under either the

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[2] It is unclear by the testimony whether the brown bag was closed or open.

Chadwick, supra (search of a locked footlocker located in the trunk of an automobile is unlawful) or the *Carroll v. United States,* 267 U.S. 132 (1925), and *Chambers v. Maroney,* 399 U.S. 42 (1970) (automobile exception cases), interpretation of the Fourth Amendment. The Court opted toward applying *Chadwick* and refused the State's insistence to extend the *Carroll/Chambers* cases to allow warrantless searches of everything found within an automobile, as well as the automobile itself. *Arkansas, supra.*

The Court unequivocally stated that their decision in *Arkansas* meant "only that a warrant generally is required before personal luggage can be searched *and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.*" *Id.* at 765 n.13 (emphasis added).

Again, on January 19, 1981, the United States Supreme Court granted certiorari in *Robbins v. California, supra,* because of the continuing uncertainty as to whether closed containers found during a lawful warrantless search of an automobile may, themselves, be searched without a warrant. The Court in *Robbins* recognized that "[i]n recent years, we have twice been confronted with the suggestion that this 'automobile exception' somehow justifies the warrantless search of a closed container found inside an automobile." *Id.* at 2844-45. The Court then acknowledged that, in *Arkansas, supra,* and *Chadwick, supra,* the Court had refused to accept the suggestion. The Court stated: "Those cases [*Arkansas* and *Chadwick*] made clear, if it was not clear before, that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." *Id.* at 2845.

The Court then proceeded to analyze the facts in *Robbins* (which are indistinguishable from our case) and concluded:

> Although the two bricks of marihuana wer discovered during a lawful search of the petitioner's car, they were inside a *closed, opaque container. We affirm today that such a container may not be opened without a warrant, even if it is found during the course of the lawful search of an automobile.* [Emphasis added.]

Id. at 2847.

Thus, as late as July 1, 1981, the United States Supreme Court has ruled that the "automobile exception" to the warrant requirement *DOES NOT* justify a warrantless search of the containers located in the luggage compartment of an automobile. We are required by law to follow the precedent set by the United States Supreme Court. *Bourguet, supra*; *Silva, supra.* Yet, the majority takes the same theory which has been consistently rejected by the United States Supreme Court and attempts to justify the search in this case. The majority opts toward citing a single federal court decision, *United States v. Milhollan,* 599 F.2d 518 (3d Cir. 1979), which was decided three months before *Arkansas, supra,* and which is *not* on point,[3] to justify their position, although the United

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[3] The target theory espoused in the *Milhollan* case supports a holding suppressing the evidence in this case. The court therein held that the satchel which was found in the passenger compartment of the automobile was not a target of the search since the police had no "inkling" that the satchel, by itself, contained relevant evidence. In this case, the officer had an "inkling" (*vague* notion) of what was in the sealed bags. Thus, absent exigent circumstances, the officer should have obtained a search warrant from a neutral and detached judge.

States Supreme Court subsequently decided *Robbins, supra,* which is directly on point with our case.

In *Robbins,* after a valid stop, the police officer found roaches, tweezers, marijuana seeds and a plastic baggie containing marijuana in the passenger compartment of the defendant's car. While searching the passenger compartment, Robbins told the officer, "What you are looking for is in the back." The officer then opened the luggage compartment of the car and found several containers and unwrapped them. The containers were described as being wrapped or boxed in an opaque material sealed on the outside with a strip of opaque tape. The containers resembled oversized cigar boxes. The Court reaffirmed that "*such a container may not be opened without a warrant, even if it is found during the course of the lawful search of an automobile.*" (Emphasis added.) *Id.* at 2847.

The Court rejected the California Court of Appeals' reasoning that "[a]ny experienced observer could have inferred from the appearance of the packages that they contained bricks of marijuana." *People v. Robbins,* 103 Cal. App. 3d 34, 40, 162 Cal. Rptr. 780, 783 (1980). We, too, should not rely on the experience of the officer. The United States Supreme Court's rationale in *Robbins* was twofold. One, the officer's vague testimony (not inexperience) failed to establish that the packages could only contain marijuana. Two, the configuration of the packages failed to establish that they could only contain marijuana. To that end, the Court stated:

> Expectations of privacy are established by general social norms, and to fall within the second exception of [footnote 13 in *Arkansas, infra*] a container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or

> otherwise, *that its contents are obvious to an observer.* If indeed a green plastic wrapping reliably indicates that a package could only contain marihuana, that fact was not shown by the evidence of record in this case.[2] [Emphasis added.]

Robbins v. California, 101 S. Ct. at 2847. The Court, in footnote 2, noted that Judge Rattigan wrote in his dissenting opinion that the containers could have been books, canned goods or any number of other innocuous items, and that, in fact, the containers resembled a carton of emergency highway flares that he carried in his trunk.

In the case at bar, the facts reveal that defendant has an even stronger factual basis to support a reasonable expectation of privacy under *Robbins, supra.* After the trunk of the car was opened, Officer Privetts testified that he saw nine bundles or packages wrapped in dark green plastic trash bags completely sealed with an opaque tape. In fact, each bundle was triple wrapped and taped with an opaque tape. When asked to describe the bags, the officer answered:

> They were (pause) a standard trash bag (indicating) like they use for packaging marijuana. It's a plastic trash bag. I don't know how to explain it to you.

The district judge then asked the officer to give an approximate height, width and depth of the bags, to which the officer responded:

> They were taped up. The packages were approximately twenty-four inches by twenty-four inches by twelve inches thick.

The officer then proceeded to testify that, in his experience, that was a common method of packaging marijuana. Yet, no definite configuration was given of the containers. In fact, the officer testified that he could not describe the bags.

Admittedly, not all containers are deserving of Fourth Amendment protection. This was stated by the United States Supreme Court in footnote 13 of *Arkansas, supra.*

Footnote 13 provides in pertinent part:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. [Citation omitted.]

Id. at 764-65.

The Court in *Robbins, supra,* after quoting the footnote, explained its meaning by stating:

> The second of these exceptions obviously refers to items in a container that is not closed. The first exception is likewise little more than another variation of the "plain view" exception, since, if the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from a searching officer's view. The same would be true, of course, if the container were transparent, or otherwise clearly revealed its contents.

Id. at 2846.

What *Robbins* holds is that the "distinctive configuration" or "transparency" of a container must clearly announce the contents of the container for it to be in plain view. In *Robbins,* a brick-shaped container wrapped in opaque plastic did not clearly announce that the container only had marijuana. In the case at bar, the

officer's vague testimony as to the configuration of the containers does not establish that the bags could only contain marijuana. As the district judge noted for the record, the type of bag in the case at bar, wrapped the way it was, is like a trash bag or paper bag he uses to carry laundry in his trunk. The officer also testified that the bags could be used for any number of other purposes.

In addition, the United States Supreme Court, for purposes of the *Arkansas, supra,* analysis, attached no significance to the fact that Robbins told the officer that what he was looking for was in the back of his car. Nor should we attach any significance to the driver's statement that they had dope.

In my judgment, *Robbins* is controlling and supports the reasonable expectation of privacy the defendant has in these tri-wrapped and sealed containers. The officer should have proceeded to obtain a search warrant. The fact that the containers were in an automobile does not justify a search of the containers absent exigent circumstances. The State does not allege that there were exigent circumstances to search the bags.

The majority, however, citing *Milhollan, supra,* persist in arguing that, since the automobile was mobile and the discovery of the bags was unexpected, there were exigent circumstances to justify application of the automobile exception to the warrant requirement. I disagree with this argument.

The United States Supreme Court has delineated what constitutes an "exigency" for searching closed, opaque containers found during the lawful warrantless search of an automobile. In *Arkansas, supra,* at footnote 11, the Court acknowledged that certain special exigencies would

justify the warrantless search of a suitcase and cited *Cady v. Dombrowski*, 413 U.S. 433 (1973), where the police had reason to believe that the automobile contained a weapon. The Court then went on to state that "such exigencies will depend upon the probable contents of the luggage and the suspect's access to those contents—not upon whether the luggage is taken from an automobile." *Arkansas* at 763, n.11. Thus, where police officers, without endangering themselves or risking loss of the evidence, lawfully detain a person suspected of criminal activity and secure the containers in the suspect's automobile, the officers should delay the search of the containers until having obtained judicial approval to do so. *Id.*

Albeit, the majority states that, since Officer Privetts did not seize the bags, he could search them. This is nothing more than sophistry. The majority tells all police officers that they can rummage through all containers located in an automobile undergoing a lawful warrantless search, so long as they do not "seize" the containers. The rationale of the majority is that the automobile is "mobile." This is wrong. The only question is whether the officer should have taken the bags along with the defendants to the police station and then should have obtained a warrant to search the bags, rather than immediately searching the bags without a warrant. Both *Robbins, supra,* and *Arkansas, supra,* hold that the former must be done. While automobiles, and containers therein, may both be mobile, containers, themselves, may be brought and kept under the control of the police. *Robbins.*

The officer, in the case at bar, should have followed appropriate police procedures and should have obtained a search warrant. The bags were in the exclusive control

of the Artesia Police Department from the moment of arrest, and Officer Privetts had no reason to believe that the bags contained any items which may have been inherently dangerous to him. In fact, the driver disspelled the officer of any concern of danger. To require Officer Privetts to impound the sealed bags and obtain a warrant to search the bags' contents creates no great hardship. The officer, defendants and the bags were all headed to the police station immediately following the arrest and unlawful search. When weighed against the deprivation of constitutional guarantees, such a requirement of obtaining a warrant from a neutral magistrate is a minimal hardship. In my judgment, the officer had probable cause but no exigent circumstances. If probable cause dispensed with the necessity of a warrant, as the majority states, then one would never be required. The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required by our constitutions. *Arkansas, supra.* An illegal search cannot be justified by what it uncovers. *See Sibron v. New York,* 392 U.S. 40 (1968).

Furthermore, although the New Mexico Legislature and other political bodies have made the "exclusionary rule" a target for a deathblow, that should be of no significance to the disposition of this case. We are not to decide these cases on the basis of what may be popular in the communities of our nation; we *must* decide these cases on their constitutional merit.

The Fourth Amendment, made applicable to the states through the Fourth Amendment, *Mapp v. Ohio,* 367 U.S. 643 (1961), guarantees to all citizens "[t]he right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seiz-

ures . . . ." U.S. CONST. amend. IV. No doubt, when examining a Fourth Amendment issue, courts have an arduous duty of determining how much protection to afford an individual citizen without unduly hampering the efforts of police to maintain peace and order. What is involved is the merits of individual rights versus the security of the remainder of the community. However, unless courts protect against infringement of individual rights, it is the community which must ultimately suffer; to protect the innocent from unreasonable invasions, courts must enforce the constitutional rights of the accused.

The United States Supreme Court has unhesitatingly asserted that the right of privacy and personal security protected by the Fourth Amendment are to be regarded as of the very essence of constitutional liberty. *Chimel v. California,* 395 U.S. 752 (1969). Thus, searches for evidence of crime demand the greatest, not the least, restraint upon an officer's intrusion into privacy. *Abel v. United States,* 362 U.S. 217 (1960). The exclusionary rule is required not only in hope of deterring unconstitutional searches, but it is also required to vindicate the right of privacy guaranteed *all* individuals by the Fourth Amendment. *Williams v. United States,* 401 U.S. 646 (1971) (Brennan, J., concurring opinion).

There exist countless cases on record in which officers, either from their over-zealous efforts to enforce the law or solve a crime, or because of their particular dislike of members of a certain minority group, commit acts which violate our constitution. For example, in *State v. Sero,* 82 N.M. 17, 474 P.2d 503 (Ct. App. 1970), the Court of Appeals stated that, since nothing had been seized as a result of the unlawful rummaging through drawers of the defendant, no issue as to the exlusion of improperly-

seized evidence was before them. In fact, in the case at bar, the officer admitted under oath that it is his standard practice to speak with defendants, knowing they have an attorney but without checking with the attorney, to investigate further the matter in question. This is contrary to a defendant's Sixth Amendment right to counsel.

I intend these examples simply as illustrations that courts must continually enforce constitutional rights as a reminder that such fundamental rights are not to be violated. Once we commence lowering the barriers of constitutional protections because of a particular defendant's guilt, then we lower the barriers for all, and for the countless number of people who may be unduly harassed by officers from whom we never hear because of their innocence, and because they chose to endure the harassment rather than speak up.

For the foregoing reasons and, more particularly, because we are mandated to follow the United States Supreme Court rather than reverse it *sub silentio,* I respectfully dissent.

/s/ Dan Sosa, Jr., Senior Justice

APPENDIX B

IN THE
DISTRICT COURT OF EDDY COUNTY
STATE OF NEW MEXICO

Nos. CV-79-24 and CV-79-25

[Filed: July 11, 1979]

STATE OF NEW MEXICO,
Plaintiff,

v.

RICHARD E. CAPPS
and
JAMES T. LEAR,
Defendants.

ORDER DENYING RE-URGED MOTION TO SUPPRESS

THIS matter having come on for hearing the 25th day of May 1979 upon Motion of each Defendant to Suppress Evidence and to Dismiss with Prejudice the information on file in the above-styled and numbered causes. The State being represented at the hearing by James I. Patterson, Assistant District Attorney, and Defendants Richard E. Capps and James T. Lear being represented by Tom Cherryhomes; and the Court, having heard the evidence and arguments of counsel, having considered the Preliminary Hearing transcript in its entirety, and having studied the Memorandum Briefs

of the various counsel, denied the Motion to Suppress, and having been advised that there has been a Re-urged Motion to Suppress, setting forth seven grounds for suppression of the same evidence, FINDS:

1. Lt. Privetts, although in an unmarked car and not in uniform, had the right and duty to investigate possible criminal behavior.

2. Lt. Privetts knew there were no license plates on the Buick automobile in which the Defendants were driving; that the automobile in question had a temporary paper Florida registration tag; and, further, Lt. Privetts remembered a teletype message from Texas stating that an automobile with a temporary Florida tag contained stolen property.

3. As the vehicle was in the process of leaving the city, Lt. Privetts turned on his red lights and stopped the car in which the Defendants were driving to check their registration.

4. While checking the registration, Lt. Privetts smelled a strong odor of raw marijuana and talcum powder.

5. Lt. Privetts asked to check into the trunk and when it was opened, found approximately 57 pounds of marijuana.

6. The occupants of the vehicle, Lear and Capps, were then arrested for possession of marijuana.

7. The officer acted upon a suspicion based upon specific articulable facts and reasonable inference in stopping the automobile in which Defendants were riding.

8. The Court, in its discretion, finds that the Order or decision involved herein involves a controlling question of law having a constitutional question as to which there

is substantial ground for difference of opinion; and an immediate appeal by interlocutory means from this Order or decision may materially advance the ultimate termination of the litigation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motions, both initial and re-urged, by each Defendant, to suppress the evidence and dismiss with prejudice be and the same are hereby denied.

/s/ Harvey W. Fort
District Judge

APPENDIX C

IN THE
COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. 4202

[Filed: March 6, 1980]

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

RICHARD E. CAPPS
and
JAMES T. LEAR,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Fort, Judge

Albert Engle
Las Cruces, New Mexico

Joseph (Sib) Abraham, Jr.
Charles Louis Roberts
El Paso, Texas

Tom Cherryhomes
Carlsbad, New Mexico

Attorneys for Defendants-Appellants

James I. Patterson
Assistant District Attorney
Carlsbad, New Mexico

Jeff Bingaman, Attorney General
Sammy Lawrence Pacheco,
Assistant Attorney General
Attorneys for Plaintiff-Appellee

MEMORANDUM OPINION

ANDREWS, Judge

This interlocutory appeal from the trial court's denial of a motion to suppress involves an investigatory stop of an automobile. Defendants are charged with possession of a controlled substance (marijuana) with intent to distribute.

On February 13, 1979, Officer Privetts of the Artesia Police Department stopped defendants' car after noticing that it had a temporary Florida license plate. Earlier the previous day, the Artesia police had received a teletype which alerted officers to "be on the lookout" for a car which might have been involved in a jewelry theft in Texas. Besides describing the individual sought, the teletype described the vehicle the suspect was last seen driving:

> DRIVING
> DK GREEN 77 CAD 2D LIC/PP. LIS/FL. LIT/PC.VIN/ 6D47S7Q223544. ALSO MAY HAVE U FLA PAPER DEALER PLATES ON VEHICLE.

The officer, who read hundreds of teletypes daily, remembered that a car with paper Florida tags was wanted in Texas in connection with a burglary. Since the vehicle in question was about to be driven from town, and after being informed that there were no backup vehicles available, Officer Privetts pulled the car over to investigate the possible connection to the robbery in

Texas. At the time of the stop the officer was not in uniform and was driving an unmarked car.

Upon stopping defendants' vehicle, the officer inquired into the defendants' license plates and registration. In response, defendant Lear reached into the glove compartment to get his application for registration. The officer, concerned for his own safety, leaned over to see what Lear was pulling out of his glove compartment. While leaning over, the officer detected the odor of raw marijuana and talcum powder (a substance often used to mask the odor of marijuana), which prompted him to inquire as to what the defendants were carrying in the trunk. Lear stated to open the trunk and then offered to bribe the officer if he would "forget the whole thing." After the officer refused the bribe, Lear opened the trunk and the officer found nine large taped and sealed bundles containing marijuana inside dark green plastic bags. Upon discovering the bags the officer placed both defendants under arrest. Thereafter, the police chief ordered that the bags be removed from the car and taken to the police station and the vehicle was impounded. The police also removed a plastic baggie of marijuana that was found in a zippered shaving kit, flight bags and other personal belongings of the defendants. Two of the large plastic garbage bags were opened (one by Officer Privetts at the scene) and their contents tested for marijuana. No search warrant was obtained for any of the items seized.

Defendants contend that the trial court erred in denying the motion to suppress the evidence for six reasons: (1) the officer did not have "reasonable suspicion" to justify his initial stop; (2) the stop, by the non-uniformed officer in an unmarked car, is both unconstitutional and in violation of New Mexico law;

(3) by leaning over to check what Lear was removing from his glove compartment and thereby smelling the marijuana and talcum the officer unconstitutionally violated defendants' Fourth Amendment rights; (4) the search of the trunk was unconstitutional; (5) the search of the personal items seized was unconstitutional; and (6) the search of the sealed bags in the trunk was unconstitutional.[1]

Reasonable Suspicion to Justify the Initial Stop

The stopping of an automobile and the detaining of its occupants constitute a "seizure" within the meaning of the Fourth and Fourteenth Amendments. Delaware v. Prouse, 99 S. Ct. 1391 (1979). To meet the constitutional requirements to justify such a seizure the detaining officer must "have a suspicion that the law has been violated or is being violated." State v. Galvan, 90 N.M. 129, 560 P.2d 550 (Ct. App. 1977). Reasonable suspicion to justify a stop need not rise to the level of probable cause to make an arrest, and as the Supreme Court stated in United States v. Brignoni-Ponce, 442 U.S. 873 (1975), the Constitution requires only that the officer be able to point to specific and articulable facts which, taken together, would lead a person of reasonable caution to believe an investigatory stop was appropriate. State v. Hall, 90 N.M. 554, 566 P.2d 103 (Ct. App. 1977). The requirement that the officer conducting the stop be able to articulate specific facts to justify reasonable suspicion protects the individual from arbitrary interference by law enforcement officers. Brown v. Texas, 99 S. Ct. 2637 (1979). *See* State v. Galvan,

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[1] Issues 4 through 6 are not discussed in this opinion because they were never presented to, nor ruled on by the trial court.

supra; State v. Hall, *supra*; State v. Ruud, 90 N.M. 647, 567 P.2d 496 (Ct. App. 1977).

In this case the stop was not the product of an arbitrary hunch, but instead was based on the officer's recollection of a wanted bulletin that he had read the day before, which indicated that certain suspects for a burglary in Texas were driving the car with temporary Florida paper license plates. The fact that the officer remembered this particular bulletin from hundreds he had read the day before and that it involved a car with temporary plates from a state over 1,500 miles away show that the incident was sufficiently rare and identifiable to make the officer's conduct reasonable.

In Adams v. Williams, 407 U.S. 143 (1972), the United States Supreme Court stated:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

The standard of reasonable suspicion is one that is dependent on the facts of each case and thereby subject to honest dispute. However, it appears that the policy basis for the standard is to avoid arbitrary and intuitive random stops by police officers. *See* Brown v. Texas, *supra*; State v. Galvan, *supra*; and State v. Ruud, *supra*. The instant facts do not suggest such an arbitrary abuse of discretion.

Stop by a Non-uniformed Officer in an Unmarked Vehicle

On this point, defendants challenge the denial of their motion on two grounds, one statutory and the other constitutional. Both are without merit. Defendants' statutory argument is based on §§ 66-8-124 and 66-8-125(c), N.M.S.A. 1978. The first of these sections requires that an officer be in uniform when arresting for violation of the Motor Vehicle Code or other related laws, and the second prohibits non-uniformed members of any municipal police force from making arrests for traffic violations.

These statutes are inapplicable since neither the original stop of Officer Privetts nor defendants' ultimate arrest were for violations of the Motor Vehicle Code. In State v. Ray, 91 N.M. 67, 570 P.2d 605 (Ct. App.), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977), this court held that § 66-8-124 "does not prevent officers from carrying out their duty to investigate possible criminal behavior even if the officers are not in uniform."

Defendants' constitutional argument rests on Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968), their claim being that, since Officer Privetts was a plain-clothes narcotics agent, the arrest was a mere pretext to search defendants' car. There is no evidence on the record below to support this contention and as such this argument merits no further discussion.

Unreasonable Detention/Plain Smell

Under this heading, defendants make two attacks on the district court's denial of their motion. One, that once the officer had acquired Lear's driver's license he should have radioed back to the station to determine if

it matched the name of the individual wanted in Texas. Second, that the officer was unconstitutionally inside the vehicle when he smelled the marijuana.

In support of its first proposition, defendants cite United States v. McDevitt, 508 F.2d 8 (10th Cir. 1974). This reliance is misplaced. In *McDevitt* the stop was invalidated because there was initially no reasonable suspicion to justify the stop. Such reasonable basis was acquired only after the defendant had already been detained fifteen to twenty minutes. It was clearly not unreasonable for the officer, in the case at bar, to check the vehicle registration.

Here, the court below recognized that the officer was attempting to insure his own safety as he had a right to do, when he leaned over to observe what defendant Lear was removing from the glove compartment. *See,* Chimel v. California, 395 U.S. 752 (1969); Rodriguez v. State, 91 N.M. 700, 580 P.2d 126 (1978); State v. Wheeler, 92 N.M. 116, 583 P.2d 480 (Ct. App. 1978). This fact, coupled with the defendants' failure to establish that the officer was in an unlawful position when he smelled the marijuana and talcum powder, defeats defendants' argument.

In conclusion, we affirm the trial court's denial of the motion to suppress for the following reasons: (1) the officer did have "reasonable suspicion" to justify his initial stop; (2) the stop, by the non-uniformed officer in an unmarked car, is constitutional and not in violation of New Mexico law; and (3) the officer did not violate defendants' Fourth Amendment rights by leaning into the car. However, as to the other issues asserted in the "Joint Application for Permission to Appeal", we will not, in this interlocutory appeal, discuss or rule on such

issues where they were never presented to, nor ruled on by the trial court.

IT IS SO ORDERED.

/s/ Leila Andrews
Judge

WE CONCUR:

/s/ [Signature], C.J.

/s/ Mary C. Walters, J.

APPENDIX D

IN THE
COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. 4202

STATE OF NEW MEXICO,
Appellee,

v.

RICHARD E. CAPPS
and
JAMES T. LEAR,
Appellants.

See End Of Motion For Court Ruling

[MOTION NOT REPRODUCED]

/s/ Charles Louis Roberts
Attorney for Appellants
505 Caples Building
El Paso, Texas 79901

/s/ Albert Engel
Attorney for Appellants

P. O. Box 178
Las Cruces, New Mexico 88001

Motion Denied.
Leila Andrews
March 18, 1980

APPENDIX E

IN THE
SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 13,032

[Friday, April 11, 1980]

RICHARD E. CAPPS
and
JAMES T. LEAR,
Petitioners,

v.

STATE OF NEW MEXICO,
Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 4202 be the same is hereby returned to the Clerk of the Court of Appeals.

Attest: A True Copy

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX F

ORAL DENIAL
REURGED MOTION TO SUPPRESS

State v. Capps, No. CV-79-24
(Dist. Ct., Eddy County, New Mexico,
June 10, 1980)

THE COURT: All right, gentlemen. I am going to find, to get rid of all your tension, that the Court is going to deny the Defendants' Motion to Suppress on the grounds that—and, I have stated this many times before in my Court. You may not appreciate this, but when we get into this gray area, and this is a gray area, where it is not clear to the Court, I am willing in those cases that are clear to set aside to you the rights that the Defendant is entitled to. When we get into this gray area, if it's going to be taken any further than it is, it's going to be taken by an Appellate Court.

APPENDIX G

IN THE
COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. 4775

[Filed: Dec. 30, 1980]

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

RICHARD E. CAPPS,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Fort, Judge

Joseph (Sib) Abraham, Jr.
Charles Louis Roberts
El Paso, Texas

and

Albert Engel
Las Cruces, New Mexico

Attorneys for Appellant

Jeff Bingaman, Attorney General
Charles F. Noble,
Assistant Attorney General

Santa Fe, New Mexico

Attorneys for Appellee

OPINION

HENDLEY, Judge

Convicted of possession of marijuana with intent to distribute contrary to § 30-31-22(A)(1), N.M.S.A. 1978, defendant appeals contending: (1) the evidence should have been suppressed because the stop of defendant's vehicle was without reasonable suspicion, and (2) the evidence should have been suppressed because the seizure of contraband from closed containers in the trunk of the defendant's vehicle was without a warrant. We reverse.

The Stop

Prior to trial, defendant filed a motion to suppress the evidence obtained in the search. The court denied the motion, finding that the officer had a reasonable suspicion for stopping the automobile. Defendant was granted an interlocutory appeal. By memorandum opinion, the Court of Appeals upheld the denial of the motion to suppress, but did not consider certain issues. After the case was remanded, the defendant filed another motion to suppress and a second hearing was held. The issues that had been decided on the appeal were not permitted to be readjudicated by the trial court.

The defendant was not entitled to relitigate the stop issue. The decision and mandate of this Court was a final determination of that issue. "The district court has only such jurisdiction as the opinion and mandate of the appellate court specifies." Casias v. The Zia

Company, 19 N.M.S.B.B. 863 (Ct. App. 1980); *see also,* State v. Montoya, 19 N.M.S.B.B. 870 (1980). Thus, this issue will not be considered. It was already decided by this Court.

The Seizure

The facts relevant to this issue are as follows: Officer Privetts, after stopping the car, smelled marijuana and talcum powder and asked Mr. Lear, the driver, what he was carrying in the trunk of his car. He said, "Nothing." The officer then asked whether there was anything he would not want him to look at. Lear looked at the passenger, the defendant, and then said, "No, I guess not." Lear placed the keys in the trunk and then he stopped and tried to bribe the officer. The officer refused the bribe and ordered the two to keep their hands where he could see them. Lear stated, "We got no guns. We got dope, but we don't got no guns." The officer then had Lear open the trunk. Inside were several large trash bags. They were very dark in color. The tops of the bags were rolled and then taped shut with silver tape. Inside each was a clear plastic bag taped shut, covered by a thicker opaque bag taped and then another opaque bag over that. There was also a brown grocery sack, which could have had the top rolled but was not sealed. When the officer looked into the trunk, he tore a hole in one of the trash bags so he could see inside of it and inside the paper sack. The plastic bags were full of marijuana. The paper sack contained four small packages of marijuana in clear plastic, weighing between one half to one pound each. When he opened the trunk, he could smell marijuana and talcum powder, which was why he searched the bags and the sack. The officer said that he knew what was inside the sacks, but he looked anyway.

He further testified that the garbage bags are commonly used for packaging marijuana.

The State contends that the search of the bags in the trunk was constitutional. Defendant does not contest the search of the luggage. The State structured its argument in support of the search as follows:

> The inquiries relevant to the present case therefore are whether the officer has probable cause to search the car; whether there was a greater expectation of privacy in the containers searched than was present in the car itself; and failing either of these, whether the searches were valid as being incident to arrest.

Expectation of Privacy

We see no basic difference between the facts in this case and the facts relating to expectation of privacy in State v. White, ___ N.M. ___, 615 P.2d 1004 (Ct. App. 1980). In *White* the officers were dealing with boxes and bags which were closed containers. To say there can be no expectation of privacy in a package which is wrapped and taped in three separate wrappings and tapings is to ignore the obvious. *See,* Ex parte Jackson, 96 U.S. 727 (1878), quoted in United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), which stated: "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles."

The State does not claim that there were exigent circumstances at the time the officer opened the bag. The defendant had been lawfully detained at this point in time. Thus, the requirement for a warrant applied to

the containers because of a reasonable expectation of privacy.

The State further claims a valid search pursuant to an arrest. However, a search incident to an arrest is limited to a search of the person and the area within his immediate control. State v. Rhodes, 80 N.M. 729, 460 P.2d 259 (Ct. App. 1969). There was no evidence that the defendants could have reached into the bags for a weapon or that they could have destroyed the evidence--84 pounds of marijuana in nine different bags. The warrantless search cannot be justified as being incident to arrest.

Reversed.

IT IS SO ORDERED.

/s/ William R. Hendley
Judge

I CONCUR:

/s/ Mary C. Walters, J.

Leila Andrews, J. (Dissenting)

ANDREWS, Judge (Dissenting)

I dissent. The issue to be resolved in this appeal is the applicability of Arkansas v. Sanders, 99 S. Ct. 2568 (1979), to the taped and sealed bundles found to contain marijuana. If these bundles come within the Fourth Amendment protection established in *Sanders,* and were of such a nature as to "support any reasonable expectation of privacy," then they should have been excluded from evidence.

Because *Sanders* indicates that the Supreme Court contemplates a case-by-case approach to the resolution of whether the appearance of a container in itself discloses that it contains contraband, the determination whether a warrant is required to search a container which has been seized depends upon the facts concerning the container. State v. White, ___ N.M. ___, 615 P.2d 1004 (Ct. App. 1980).

Some containers by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. State v. White, *supra,* quoting State v. Smith, Ct. App. No. 3927, filed November 8, 1979, overruled on other grounds, 94 N.M. 379, 610 P.2d 1208 (1980). *Compare* State v. Coleman, 87 N.M. 153, 530 P.2d 947 (Ct. App. 1974).

In the instant case, the strong and pungent aroma emanating from the bags, recognized as marijuana by an officer well-trained in its detection, coupled with the appearance of the bags, defendant's statement and the particular circumstances, created facts sufficient to make it obvious that the bags contained contraband. Defendant had no "reasonable expectation of privacy" in these bags. The seizure was proper. The district court

was correct in denying the motion to suppress in regard to the plastic bags and grocery sack. The case should be affirmed.

/s/ Leila Andrews
Judge

APPENDIX H

IN THE
SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 13,486

[Friday, January 30, 1981]

STATE OF NEW MEXICO,
Petitioner,

v.

RICHARD E. CAPPS,
Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

This cause coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari be and the same is hereby granted, and the writ of certiorari shall issue from this Court as prayed for in the petition.

Attest: A True Copy

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX I

IN THE
SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 13,486

[Friday, February 26, 1982]

STATE OF NEW MEXICO,
Petitioner,

v.

RICHARD E. CAPPS,
Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

This matter coming on for consideration by the Court upon Motion of Respondent for a rehearing, the Court having considered said Motion and being sufficiently advised in the premises:

NOW, THEREFORE, IT IS ORDERED that Motion of Respondent for Rehearing be and the same is hereby denied.

Attest: A True Copy

[SEAL] /s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

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